

THIS OPINION
IS NOT A PRECEDENT
OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

wbc

Mailed: October 21, 2016

Opposition No. 91223394

Garcoa, Inc.

v.

Jeffrey Alan Deane

**Before Kuczma, Gorowitz and Goodman,
Administrative Trademark Judges.**

By the Board:

This case now comes up on Garcoa, Inc.'s ("Opposer") March 29, 2016 motion for summary judgment on Jeffrey Alan Deane's ("Applicant") counterclaim of abandonment. The motion is contested by Applicant.

A decision on summary judgment necessarily requires a review of the operative pleadings in the proceeding. Accordingly, the Board must first examine the sufficiency of Applicant's counterclaim of abandonment.

In the combined answer and counterclaim filed October 23, 2015, Applicant alleged:

12. Applicant has been unable to find any current use in commerce of the NATURE'S BEAUTY mark that is the subject of Opposer's Registration. Upon a reasonable inquiry, Applicant is unable to find sale of any of the goods in the Registration, whether directly through the Opposer via third party retailers. Applicant

is therefore informed and believes that the mark in Opposer's Registration has been abandoned, and requests that it be cancelled on that basis pursuant to Trademark Act § 45, 15 U.S.C. § 1127.

13. To the extent that Opposer in fact is able to demonstrate proper and continuing use in commerce on any goods identified in Opposer's Registration, Applicant requests in the alternative that the Board delete all goods for which the mark has been abandoned, i.e., those for which Opposer does not use the NATURE'S BEAUTY mark and lacks proper evidence supporting an intent to resume use.

6 TTABVUE 3-4.

To properly plead a counterclaim of abandonment, Applicant must allege (1) at least three consecutive years of nonuse, or (2) facts that show a period of nonuse less than three years coupled with an intent not to resume use. *See* Trademark Act § 45, 15 U.S.C. § 1127; *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390 (Fed. Cir. 1990); *Otto Int'l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861 (TTAB 2007).

Applicant claims Opposer does not use its mark on its goods, but does not allege whether there has been a period of non-use for at least three consecutive years or for a period of less than three years coupled with an intent not to resume use. Accordingly, Applicant's counterclaim of abandonment is not sufficiently pleaded.

A party may not obtain summary judgment on a claim that has not been properly pleaded. *See* Fed. R. Civ. P. 56(a); *Asian & Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1480 (TTAB 2009); *Intermed Communications, Inc. v. Chaney*, 197 USPQ 501, 503 n. 2 (TTAB 1977) ("If a claim has not been properly

pleaded, one cannot obtain summary judgment thereon”); TBMP § 528.07(a) (2016).

As discussed, Applicant has failed to properly plead the claim of abandonment. Because summary judgment cannot be granted on improperly pleaded claims and Applicant has not properly pleaded abandonment, Opposer’s motion for summary judgment is **denied**.

Applicant is allowed until **twenty (20) days** from the mailing date of this order to file an amended pleading to properly assert abandonment, failing which Applicant’s counterclaim will proceed on the ground of fraud only.¹ See TBMP §§ 309.03(c) and 503.03.

Proceedings are resumed. Dates are reset as follows:

Expert Disclosures Due	November 27, 2016
Discovery Closes	December 27, 2016
Plaintiff’s Pretrial Disclosures	February 10, 2017
30-day testimony period for plaintiff’s testimony to close	March 27, 2017
Defendant/Counterclaim Plaintiff’s Pretrial Disclosures	April 11, 2017
30-day testimony period for defendant and plaintiff in the counterclaim to close	May 26, 2017
Counterclaim Defendant’s and Plaintiff’s Rebuttal Disclosures Due	June 10, 2017
30-day testimony period for defendant in the counterclaim and rebuttal testimony for plaintiff to close	July 25, 2017
Counterclaim Plaintiff’s Rebuttal Disclosures Due	August 9, 2017
15-day rebuttal period for plaintiff in the counterclaim to close	September 8, 2017

¹ The Board has not been asked to review, and has not reviewed, the sufficiency of Applicant’s counterclaim of fraud.

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Brief for plaintiff due	November 7, 2017
Brief for defendant and plaintiff in the counterclaim due	December 7, 2017
Brief for defendant in the counterclaim and reply brief, if any, for plaintiff due	January 6, 2018
Reply brief, if any, for plaintiff in the counterclaim due	January 21, 2018

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.